United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7510

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ELGIE & COMPANY,

Plaintiff-Appellant,
(Docket No. 76-7510)

—against—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant, (Docket No. 76-7562)

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

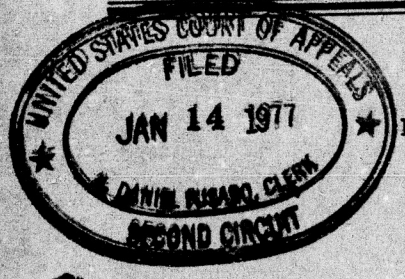

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TABLE OF CONTENTS

Cases Cited

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Statement

This appeal by plaintiff-appellant cargo owner, (hereinafter designated as consignee) is from a final judgment for cargo loss entered in an admiralty action on October 13, 1976 (34a) by Judge Goetell in the Southern District of New York.

Facts

The plaintiff-appellant was the consignee of cargo, which it had purchased from Shuron Continental in 1973, consisting of an optical grinding machine referred to as a generator (since it generates ophthalmic curves on lenses). This generator, packed in a large crate had been shipped by the vendor Shuron Continental along with 11 smaller cartons purchased at the same time. The goods were sold pursuant to an invoice against an irrevocable letter of credit which called for the draft to be accompanied by, amongst other things, an *"on board"* shipping company bill of lading marked "freight prepaid". The generator itself, exclusive of parts, was invoiced at $8,670. Including freight and insurance its value came to $10,559.47.

The District Court found that the defendant-appellee steamship line received the goods in question at the New York pier and issued a dock receipt therefor. The dock receipt incorporated the terms of the steamship line's regular form of bill of lading (19a).

The District Court further found that "The defendant, South African Marine, had issued an 'on board' bill of lading for all eleven cartons and the crate which was marked 'Received on board March 22, 1974.' The bill of lading was endorsed and presented to a bank along with other pertinent documents and payment was made to the seller, Shuron Continental. The issued short-form bill of lading incorporated all the terms and conditions of the carrier's regular long-form bill of lading. The long-form extended the application of COGSA (Carriage of Goods by Sea Act 46 USCA Sec. 1301 et seq.) to the entire time that the goods were within the possession and responsibility of the carrier (8a). * * *. Although the bill of lading indicated that all twelve pieces of cargo had been loaded on board the "NEDERBURG" on March 22, 1974, the

stevedore's records reveal that only eleven cartons were loaded *and this over a three-day period commencing on that date*" (9a). (Italics added).

The one crate containing the generator was never delivered to the consignee, (5a) nor was there any evidence at trial that it was ever found. The District Court directed the entry of judgment in favor of plaintiff consignee for the loss; however, the recovery was limited to $500.00 pursuant to the terms of the bill of lading (28a).

Plaintiff's appeal is directed solely to that part of the judgment which limits its recovery against the defendant to the sum of $500.00.

Questions Presented

1. The sole question presented to this Court is: Did the District Court err in limiting the recovery against defendant to $500.00 in view of the fact that an erroneous bill of lading was negotiated against a letter of credit to plaintiff's detriment?

POINT I

An ocean carrier issuing a bill of lading with false information in order that the bill of lading may be negotiated through a bank to the detriment of a third party may not rely on the defenses contained therein.

Although one of the causes of action for which plaintiff consignee brought this action against the ocean carrier was founded on the basis that "having relied upon the validity of the on-board bill of lading prior to April 29, 1974 plaintiff became for value the owner of said shipment and the

owner and holder of said "on-board" bill of lading, the District Court did not address itself to this point.

The District Court in its opinion stated:

> "The final argument of the plaintiff is that the limitation cannot be applied here because there was fraud or negligence on the part of the shipline which invalidates the bill of lading and negates the effectiveness of the package limitation. Plaintiff relies primarily on the *Havjo* case, but it stands simply for the proposition that a shipline cannot gain the benefit of the package limitation merely by issuing a bill of lading claiming that the goods were on board when, in fact, they were not. While there was undoubtedly negligence on the part of either the shipline or the stevedore (a point to be considered subsequently), there clearly was no fraud. The bill of lading was simply an error and nothing more.
>
> The plaintiff argues, in effect that the shipline should be estopped from asserting the limitations defense because of its error in issuing an incorrect bill of lading. If the plaintiff's argument were accepted, it would be necessary in every non-delivery case for the shipline to prove that the goods were in fact loaded as per the bill of lading. With the rare exception of goods lost at sea, in non-delivery cases the ultimate disposition of the goods is usually unknown. To nullify the package limitation because the bill of lading may have been erroneous would be to completely change the burden of proof and the relationships between the parties. The *Havjo* case does not require such a result."

Since plaintiff-consignee's action relates to a misrepresentation contained in the contract, (bill of lading), upon

which the letter of credit was negotiated, the pertinent sections of COGSA, 46, U.S.C.A. Sec. 1301 et seq. are not pertinent. This statute relates solely to failure of the carrier to perform its contract of carriage and *not* to any misrepresentations contained in that contract. It does not limit plaintiff's actions in tort, based upon fraudulent misrepresentations made by and relied upon and thus causing damage to the plaintiff prior to the loading. This holds true, in respect of the cargo, even though these representations were among the generic representations contained in the contract for the carriage of goods by sea. *Toho Bussan Kaisha, Ltd.* v. *American President Lines,* 155 F. Supp. 886, 889 affirmed 265 Fed. 2nd 418.

COGSA Section 1311 expressly provides:

> "Nothing in this Act shall be construed as superseding any part * * * of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when goods are loaded on * * * the ship."

In the *Toho* case cited above the ocean carrier was denied the defense of the one year statute of limitation provided by COGSA, as the plaintiff in that case was an innocent victim of fraud, who was not basing its claim upon the bill of lading as a contract. In that case the steamship carrier had falsely dated the bill of lading in order to have it negotiated at the bank.

In the instant case the ocean carrier placed an "on board" stamp on the bill of lading knowing that without such "on board" stamp, the bill of lading could not have been negotiated against the letter of credit and the plaintiff-consignee's money would not have been paid. The fact that the ocean carrier may have placed the stamp on the

bill of lading through neglect rather than design does not distract from the fact that the words "on board" are very significant and a specific requirement of the irrevocable letter of credit. Constructive fraud does not require intent to deceive. Liability for constructive fraud may be based on a negligent or even innocent misrepresentation. *U. S. Fibres Inc.* v. *Proctor & Schwartz, Inc.*, 358 F. Supp. 449, 460 affd. 509 F2d 1043 (6th Cir. 1975).

If the steamship company desires to take its duties lightly and does not bother to make a determination if the cargo is actually on board before issuing such a bill of lading, it must accept the consequences.

It is not to be believed that if any consignee actually knew that the cargo was lost prior to loading aboard the S.S. "S.A. NEDERBURG", it would have purchased the *"on board"* bill of lading for $10,559.47, knowing it was only to receive $500.00 if the ocean carrier made false statements which induced the bank to make payment. As the Court stated in *Olivier Straw Goods Corporation* v. *Osaka Shosen Kaisha (Alaska Maru)*, 27 F. 2d 129, 134:

> "However common the practice may be of issuing on board bills of lading when the goods are not yet laden, the practice is at best extremely negligent. It not only may mislead merchants as to their actual contract rights but, if recognized as valid, is likely to deprive purchasers who import merchandise, banks financing their operations, and companies insuring the goods against risks, of that certainty as to their rights and obligations which truthful conduct and fair business dealings at least tend to promote."

The proposition stated by the Court in the *Olivier Straw Goods* case was followed by this Circuit in *Miles Metal Corporation* v. *MS* "HAVJO", 494 Fed. 2d 563, (2d Cir.

1974). The District Court attempted to distinguish the *Miles Metal* case from the instant case on the basis that in the *Miles Metal* case the COGSA was not extended through terms of the bill of lading to the periods during which the goods were in the custody of the ocean carrier prior to loading (19a). In the instant case there is no question that the bill of lading contains a clause extending COGSA and the package limitation to the period prior to loading, but it is the contention of the plaintiff-consignee that this does not have the effect of providing a limitation to plaintiff's action for misrepresentation. See the *Toho* case (Supra).

The defendant-ocean carrier and District Court also make a point of the fact that a dock receipt was issued to the shipper by the ocean carrier and the dock receipt incorporated the terms of the carrier's regular form bill of lading (23a). The plaintiff in this action is the consignee, not the shipper, and is not bound by the terms of the dock receipt which was not one of the documents negotiated against the letter of credit upon which the plaintiff-consignee relied. In fact it did not even know of it when the letter of credit was negotiated. The steamship carrier cannot exculpate itself from the effects of a misrepresentation in the contract by superimposing, or attempting to superimpose, on that contract a chain of allegedly exculpatory clauses which relate solely to the performance of the contract.

POINT II

The importance of an "ON BOARD" endorsement of the bill of lading.

The District Court stated that:

> "To nullify the package limitation because the bill of lading may have been erroneous would be to completely change the burden of proof and the relationship between the parties." (22a)

Plaintiff is not attempting to nullify just the package limitation but rather nullify the bill of lading. In the instant case the Court found that the bill of lading *was* erroneous. Whether the error was due to design or neglect is of no consequence, because a bill of lading is put into circulation by the ocean carrier and the ocean carrier knows very well that the bank will rely upon the accuracy of information contained therein, when honoring the letter of credit. By analogy, the statutory rules, as set forth in COGSA, state that the description of the goods on the bill of lading constitutes *prima facie* evidence of receipt of the goods by the carrier, therein described. 46 USCA § 1303(4).

One purpose of the Carriage of Goods by Sea Act, was to enable the consignee—or a third party such as a bank—to rely on the description of the goods stated in the bill of lading. The statutory policy permitting a reliance on the bills of lading is an important one. *Kupfermann* v. *United States,* 227 Fed. 2d 348, 350 (2 CA 1955).

Before the days of steamship lines, with fleets of more or less fungible vessels and warehouse facilities at loading points, it was not usually possible for the vessel owners or their agents to receive cargo until the vessel was ready to load it. As the captain and mate were then at hand,

the bill of lading was usually signed by one of these officers after the merchandise had been placed on board. These officers had *prima facie* authority to bind the owners in respect to the representations contained in the bill of lading. Thus the original bill of lading—now the "on-board bill of lading"—was a receipt for merchandise loaded on a named vessel and also a contract to carry it to an indicated destination.

As modern steamship lines developed it became the custom to receive merchandise on piers, to be stored there until arrival of a ship making a voyage to the appropriate destination. In such a case, the on-board bill of lading was no longer an accurate representation, and the transporters substituted for it a bill of lading signed by some clerk as agent for the transporter and known as the "received-for-shipment" bill of lading.

The foregoing created problems which became sufficiently acute to induce New York bankers to take measures for its solution.

In January 1920, a representative of counsel and a member of the staff of each of ten New York banks, trust companies, and private bankers doing an international business met and appointed a committee which addressed to the leading steamship lines operating in the port of New York a letter calling to their attention the problem of protection for banks which, when directed by so-called "export letters of credit" to pay against bills of lading, accepted documents (stated to be bills of lading) expressly giving the steamship companies the right to ship the goods by a steamer other than the one mentioned in the bill, and in many cases not acknowledging receipt of the goods on board or even on dock.

As a result the steamship companies agreed, in cases where practical, to adopt the plan suggested by the Bank-

ers' Committee, namely, an "on-board" endorsement of the bill of lading after the goods were actually loaded.*

The clause "on-board" thus became vital and a *sine qua non* in the honoring of letters of credit. The fact that in the instant case the erroneous "on-board" stamp was placed on the bill of lading possibly by negligence rather than intent, makes no difference as stated by the Court in the *Olivier Straw Goods* case (supra).

The Court stated in the instant case (20a):

> "Although the evidence was far from conclusive, it would appear that the crate in question was in fact loaded and shipped aboard the S.S. Morgenster on March 15, 1974, as originally intended by the seller's freight forwarder. The carrier's long-form bill of lading allows it to ship a piece on any vessel —there was no requirement that the shipment be made aboard a specific vessel."

The plaintiff-consignee does not contend that a steamship line hasn't the liberty to ship cargo on alternate vessels; however, it must issue a bill of lading for the vessel on which it is shipped. The fact was that it never outturned off another vessel nor was any explanation for the lack of such outturn ever offered.

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* Bank Credits and Acceptance 5th Edition, 1974 Henry Harfield, Esq. pages 60-62.

CONCLUSION

The ocean carrier, having issued a bill of lading with an erroneous "on-board" endorsement, knowing that such bill of lading would be negotiated through the bank to a third party relying on such endorsement to his detriment, may not use the defense of limitation of liability in the bill of lading.

Plaintiff-consignee is entitled to recovery in full for non-delivery of its cargo.

Respectfully submitted,

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Of Counsel

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

Index No.

76-7510

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF N.Y. ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at BERGEN Co N.J.

That on JAN 14 1977 deponent served the annexed 2 COPIES BRIEF

on HAIGHT GARDNER POOR HAVENS HILL RIKINS CAREY LOESISER O'BRIEN
attorney(s) for 96 FULTON NY NY
in this action at 1 STATE STREET PL. NY NY
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me JAN 14, 1977
Andrew A. Fitzpatrick

ANDREW A. FITZPATRICK
NOTARY PUBLIC, State of New York
No. 30-4824891
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1978

David Kravs
This name signed must be printed beneath
DAVID KRAVS

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law